(7)

No. 91-545

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN RESERVATION; BLACKFEET TRIBAL BUSINESS COUNCIL; BLACKFEET TAX ADMINISTRATION DIVISION; EARL OLD PERSON, CHAIRMAN; ARCHIE ST. GODDARD, VICE CHAIRMAN; MARVIN WEATHERWAX, SECRETARY; ELOUISE C. COBELL, TREASURER

and

FORT PECK TRIBAL EXECUTIVE BOARD; FORT PECK TRIBAL TAX COMMISSION ASSINIBOINE & SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION; KENNETH E. RYAN, TRIBAL CHAIRMAN; PAULA BRIEN, TRIBAL SECRETARY/ ACCOUNTANT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Review of the Ninth Circuit's decision is necessary to preserve the coherence of tribal sovereignty jurisprudence and avoid an arbitrary patchwork of law. The briefs filed by respondents the Fort Peck Tribal Executive Board *et al.* and The Blackfeet Tribe of the Blackfeet Indian Reservation *et al.* (collectively, the "Tribes") only serve to underscore the importance of the questions presented and the need for a harmonizing decision by this Court.

I.

Neither the Ninth Circuit nor the Tribes have reconciled the rulings below with the tribal sovereignty principles this Court articulated in *Montana v. United States*, 450 U.S. 544 (1981). They have instead sought to avoid those principles by contending that different sovereignty rules apply in a variety of circumstances. That contention is flatly at odds with the coherent framework established by *Montana* and subsequent decisions of this Court.

A.

Respondents approach tribal sovereignty as balkanized terrain. They contend that there is one set of rules for taxing nonmembers on trust lands, another for regulating their activities on "fee" lands, and yet another for exercising criminal jurisdiction over them. *See* Ft. Peck Br. at 12-16; Blackfeet Br. at 7-12.

Nothing could be further from the plain language of *Montana*, nor more destructive of consistent treatment of tribal relations with nonmembers. *Montana* specifically addressed "the principles of inherent sovereignty," and expressly did so from a general perspective. *See* 450 U.S. at 563-66. It looked from "the first Indian case to reach this Court," *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), to a then-recent case involving tribal criminal jurisdiction, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), to articulate "general principles of retained inherent sovereignty." *Id.* at 565. As the Court explained, those general principles "support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.*

Montana admitted only two exceptional circumstances in which a tribe might "exercise some forms of civil jurisdiction over non-Indians on their reservations." *Id.* Under the exception at issue here,

> [a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who

> enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.

Id. (citations omitted). The Tribes' urgings that these principles are of limited scope, applicable only to fee land on reservations and isolated from questions of taxation, ignore both the words and the reasoning of this Court.

The Tribes' limitation of *Montana* to fee land, Ft. Peck Br. at 13-14; Blackfeet Br. at 7-8, is directly at odds with the *Montana* Court's analysis of "general principles of retained inherent sovereignty" and articulation of a "general proposition" regarding the inherent sovereign powers of an Indian tribe over nonmembers. 450 U.S. at 565.[1] The "consensual relationship" requirement that must be met in order for tribes to "retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians" applies to all such persons "on their reservations, even"—but not solely—"on non-Indian fee lands." *Id.* Indeed, *all* of the cases *Montana* itself cited as examples of the "consensual relationship" exception involved nonmember use of *trust* lands.

Moreover, a distinction between "fee" and "trust" lands is particularly inappropriate as applied to railroad rights-of-way. Whether a particular right-of-way from the Federal government takes the form of a fee or an easement, the railroad's use "is, and necessarily must be, exclusive." *Choctaw, O. & G. R.R. v. Mackey*, 256 U.S. 531, 539 (1921). Tribes are powerless to interfere with a railroad's use of such a right-of-way. *See* Pet. at 17-18. Distinctions between the power of a tribe over trust lands

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[1] To the extent *Montana* held that a tribe may regulate hunting and fishing on trust lands, *id.* at 557, it only applied the general principles it set forth. Because the tribe in that case had the power to exclude nonmembers from hunting and fishing on trust lands, the arrangements it made with them to permit such activities plainly created a consensual relationship permitting regulation. *See United States v. Montana*, 604 F.2d 1162, 1166-69 (9th Cir. 1979), *aff'd in part & rev'd in part*, 450 U.S. 554 (1980).

and over fee lands—whatever relevance they may have in other contexts—are simply inapplicable to a railroad right-of-way granted by the Federal government. Indeed, this Court has observed that it "is wholly immaterial whether the rights vested in the [railroad] corporation by the act of Congress were rights of ownership or merely those which result from the grant of an easement. *Whatever they are, they were taken out of the reservation by virtue of the grant . . . .*" *Maricopa & P. R.R. v. Arizona*, 156 U.S. 347, 352 (1895) (emphasis added).

The Tribes' argument does not even make sense on its own terms. While they assert that their power to tax flows from their retained sovereignty, respondents insist on a distinction based on land ownership. But a power to tax derived from and limited by ownership is, in essence, a power to charge for entry onto the land. And the Tribes plainly lack such power with respect to interstate railroad rights-of-way. *See* Pet. at 17-18.

The suggestion that *Montana* has no application to tax matters, Ft. Peck Br. at 12-13, is contradicted by its specific reference to taxation as one form of regulation by which tribes may exercise jurisdiction over nonmembers if, but only if, the requisite conditions exist. *See* 450 U.S. at 565.[2] *Montana* itself reconciled two of the key tax cases cited by the Tribes; as the Court explained, both *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), and *Morris v. Hitchcock*, 194 U.S. 384 (1904), involved precisely the sort of consensual relationships that will permit taxation. 450 U.S. at 565-66; *see also Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 427 (1989) (plurality opinion) (noting reconciliation of *Montana* and *Colville* on this basis).[3] The other decisions

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[2] The Blackfeet respondents concede that *Montana* applies to taxation on fee lands. Blackfeet Br. at 11 n.6.

[3] While the Tribes claim that BN conceded their power to tax on trust lands, it is obvious that the statements on which they rely

of this Court on which respondents rely, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), and *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985), both involved taxes on activities conducted pursuant to mineral leases that a tribe had entered into with nonmembers, and thus can be reconciled with *Montana* on exactly the same grounds.[4]

There is, in any event, nothing in the later tax cases to suggest that the carefully-reasoned limits *Montana* placed on tribal authority over nonmembers had somehow been modified.[5] It is unthinkable that this Court, having expressly placed taxes within the *Montana* rule and shown how its two prior tax cases were consistent with that rule would the very next Term, in *Merrion*, reverse field and place taxation under a substantially looser standard. It is even more unthinkable that the Court would do so without even bothering to cite *Montana*. And *Kerr-McGee*, an opinion that simply relied on *Merrion*, cannot conceivably be read to have effected any change in the law.

Cases such as *Merrion* do, however, appear to have led lower courts to ignore *Montana* in tribal taxing cases. Certain language in *Merrion* can cause mischief if it is read in isolation from *Montana*, and by doing just that the Ninth Circuit's decision will only serve to exacerbate the problem. It is for these reasons, as the Tribes' own

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merely noted that, under *Colville*, taxation is permissible to the extent it satisfies the *Montana* standards.

[4] Indeed, all of the lower court decisions on which the Tribes rely involved such consensual relationships. *See, e.g., Southland Royalty Co. v. Navajo Tribe*, 715 F.2d 486 (10th Cir. 1983) (tax on mineral leases); *see also* Pet. at 15 n.11. Those cases thus offer no support for the Ninth Circuit's decision.

[5] The Tribes are wrong in suggesting that *Merrion* negates any requirement of consent in the tax context. *See* Ft. Peck Br. at 15; Blackfeet Br. at 12 (quoting 455 U.S. at 147). All the quoted language indicates is that, once a nonmember has entered into a consensual relationship with a tribe sufficient to support tribal regulation, there need not be specific consent to a particular tax.

arguments illustrate, that this Court should grant review and lay such confusion to rest.

B.

The question whether the *Montana* principles apply to tribal taxation of nonmembers cannot be avoided based on the Ninth Circuit's offhand suggestion that the result would be the same under those principles. *Burlington Northern R.R. v. Blackfeet Tribe*, 924 F.2d 899, 904 n.7 (9th Cir. 1991), Appendix to Petition ("Pet. App.") at 11a n.7. The lower court's one-sentence footnote asserting that BN has a "consensual relationship" with the Tribes reduces the necessary consent to mere presence and wrongly focuses on the consent of the tribe rather than that of the party being taxed.

As the *Brendale* plurality explained, "*Montana* itself necessarily decided" that a nonmember's mere presence within reservation boundaries does not create a consensual relationship. 492 U.S. at 428. And as BN has shown, the presence of its transcontinental lines on reservations now occupied by the Tribes was the result of right-of-way grants directly from the Federal government, not any relationship between the Tribes and the railroad. *See* Pet. at 3-4; *see also id.* at 19-20 & n.16.[6]

The Tribes' arguments that they have consented to BN's presence on the reservation, Ft. Peck Br. at 16; Blackfeet Br. at 12-14, are wholly misplaced. What they characterize as tribal consent to BN's rights-of-way was no more than general acquiescence in the Federal government's retention of the ability to grant such rights in its own discretion. *See* Pet. at 19-20. Indeed, this Court has held that Congress has authority to use its power of emi-

[6] The Blackfeet respondents offhandedly suggest that BN "is a third-party beneficiary of the agreement between the Tribe and the United States." Blackfeet Br. at 15 n.12. But this argument actually cuts the other way, since a third party beneficiary is, by definition, a stranger to the contract, and its consent is irrelevant. *See* Restatement (Second) of Contracts § 306 cmt. a (1979).

nent domain to grant a right-of-way across a reservation over the objections of the tribe. *See Cherokee Nation v. Southern Kansas Ry.*, 135 U.S. 641, 656 (1890).

More important, the argument that taxation can be based solely on a tribe's acquiescence to the presence of a nonmember on its reservation turns the idea of consent on its head. As this Court has recently explained, what matters is not the consent of the tribe, but the consent of the party over whom tribal authority is being asserted; such authority cannot be extended "over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system." *Duro v. Reina*, 110 S. Ct. 2053, 2064 (1990) (citing *Merrion*, 455 U.S. at 172-73 (Stevens, J., dissenting)).

The question of consent presents another issue on which this Court's guidance would benefit lower tribunals: the significance that a tribe's power to exclude nonmembers from reservation lands has in determining its power over them. Since *Merrion*, that issue has loomed as one that could serve to bring the concept of retained tribal sovereignty into sharper focus. *See* 455 U.S. at 168-173, 175 (Stevens, J., joined by Burger, C.J., and Rehnquist, J., dissenting).

That concern can be addressed with particular clarity in the context of an interstate railroad right-of-way. Consistent with its goal of establishing transportation corridors to open the West, the Federal government granted BN the exclusive use and occupancy of these rights-of-way; moreover, to protect the public interest in access to interstate transportation, Federal law prohibits any effort to prevent BN's railroad operations over them. *See* Pet. at 17-18. Under governing Federal law, the Tribes have no power to exclude BN from access to the property. *Id.* If such power is essential to a tribe's authority over nonmembers, this case frames the issue in stark relief.

II.

BN is not alone in recognizing the serious and widespread implications that the Ninth Circuit's decision will have on the Nation's railroads and on the fabric of tribal relations with nonmembers and state and local governments.[7] Indeed, the Tribes do not contest the importance of this case to the railroad industry, the sweeping impact of the Ninth Circuit's Indian law decisions, or the likelihood that the lower court's ruling will encourage other tribes to impose railroad and utility taxes such as these. *See* Pet. at 28-30.

Nor do they deny that the taxes at issue here discriminate against nonmembers and indeed were designed to shift the costs of tribal government to those who cannot avoid having their interstate operations cross reservation lines. *See* Pet. at 28.[8] The suggestion that railroads and other interstate utilities can protect themselves against

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[7] Six states (the "States"), the Association of American Railroads ("AAR") and a telephone cooperative have also urged the Court to grant BN's petition.

[8] The Fort Peck respondents argue that the impact of taxes on nonmembers can be ignored if the tax falls on "utilities that have chosen to use reservation trust lands owned by Indians." Ft. Peck Br. at 17. That argument again equates mere presence with consent to be subject to tribal taxation. *Compare Brendale*, 492 U.S. at 428. It also ignores the fact that it was the Federal government, not BN, that selected the route for BN's right-of-way and thus caused it to cross the reservations. *See* AAR Br. at 17-18.

The Tribes also endeavor to portray this as a situation in which taxes merely reflect the costs of having a railroad or utility traverse a reservation. Ft. Peck Br. at 11-12 n.13; Blackfeet Br. at 18. But the general availability of police and fire protection to those present on a reservation cannot in and of itself create a consensual relationship. *See Brendale*, 492 U.S. at 428. Nor can the availability of such services excuse the impact of an impermissible tax. In any event, BN is billed directly by the Bureau of Indian Affairs for the costs of responding to fires on the reservations caused by railroad operations. *See* Exhibit E to BN's Reply Brief in Support of Motion for Preliminary Injunction, *Burlington Northern R.R. v. Fort Peck Tribal Executive Board*, No. CV-87-055-CF (filed Apr. 20, 1987).

discriminatory taxation by lobbying tribal governments, Blackfeet Br. at 17, blinks at the reality of the situation—the closed nature of tribal society and government.

There is no substance to the Tribes' contentions that the "substantial federal control" to which they are subject precludes the possibility of discriminatory taxes on nonmembers. *See* Ft. Peck Br. at 17; Blackfeet Br. at 15-16. As the Tribes themselves recognize, Federal approval of tribal taxes such as these is not always required. *See* Blackfeet Br. at 16 n.12 (citing *Kerr-McGee*). Even where necessary, such review hardly is designed to protect the interests of nonmembers and, as this case demonstrates, does not in fact prevent discrimination. The review is conducted by an agency whose task is to serve as the guardian for Indian tribes and whose role in practice is to further their financial interests. Under these circumstances, it is not surprising that when there is Federal review, it is perfunctory. *See* AAR Br. at 7-8 n.7 (Fort Peck tax approved "the next day" after being submitted to the Bureau of Indian Affairs).

Finally, the alleged congressional policies in favor of "economic self-sufficiency" and "self-determination" invoked by the Fort Peck respondents, Ft. Peck Br. at 18-20, are beside the point. There is no evidence that Congress intended such policies to override the law of tribal sovereignty established by this Court. To the contrary, there is every reason for strict adherence to the limits that law places on tribal power, particularly where failing to do so would conflict with other Federal policies seeking to protect the economic health of the railroad industry. *See* Pet. at 25-27.

The Ninth Circuit's decision encourages the adoption of new or additional taxes such as these on more than 55 reservations over which major railroads must conduct their operations. *See* AAR Br. at 5-6, 1a-3a. The impact of the decision beyond the railroad industry will be even greater, for it will not only subject other utilities to tribal

taxation but also seriously interfere with "the development of coherent principles for structuring the relationships among states, tribes, and individual citizens." States' Br. at 15.

CONCLUSION

For all of these reasons and for the reasons stated in the Petition, the writ of certiorari should be issued.

Respectfully submitted,

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